(13)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No. 433.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Petitioner,

vs.

JULIA C. MILLER, Administratrix of the Estate of
ERNEST F. MILLER, Deceased,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Page

Statement 1

Summary of Argument 9

Argument 16

I. Petitioner has stated no sufficient ground for review 16

II. Petitioner's counsel having admitted liability in his argument to the jury, petitioner cannot now contend that it is not liable 17

III. The doctrine of res ipsa loquitur is applicable in Federal Employers' Liability cases 19

IV. A collision between two trains upon a railroad company's track makes a prima facie case under the res ipsa loquitur doctrine 19, 20

V. Petitioner was in exclusive control of all of the instrumentalities here involved, so as to make the res ipsa loquitur doctrine applicable, because the law is settled that where a railroad permits the use of its road by another, the user and its servants and employees become and are the agents and servants of the owner 20

VI. The fact that petitioner is a terminal railroad company does not affect the general rule 36

VII. The purported defense that petitioner was "compelled" to permit use of its tracks is no defense, and, in any event, was neither pleaded nor proven 41

Conclusion 47

Cases Cited.

Anderson v. West Chicago S. R. Co., 200 Ill. 329, 65 N. E. 717 ..... 12, 25
Arkansas City Canning Co. v. Dunston, 63 Kan. 879, 64 P. 125 ..... 9, 19
Armstrong v. Chicago & W. I. R. Co., 350 Ill. 426, 183 N. E. 478, certiorari denied 289 U. S. 724, 53 S. Ct. 523, 77 L. ed. 1475 ..... 12, 25, 29
Baltimore & O. R. Co. v. Kast, 6 Cir., 299 F. 419, certiorari denied 266 U. S. 613, 45 S. Ct. 95, 69 L. ed. 468 10
Baltimore & O. S. W. R. Co. v. Burtch, 263 U. S. 540, 44 S. Ct. 165, 68 L. ed. 433 35
Barnes v. Red River & G. R. Co., 14 La. App. 188, 128 So. 724 ..... 13, 31
Benner v. Terminal R. Assn. (Mo. Sup.), 156 S. W. 2d 657, certiorari denied 315 U. S. 813, 86 L. ed. (Advance Sheets) 668 10
Carpenter v. Baltimore & O. R. Co., 6 Cir., 109 F. 2d 375 10
Central R. Co. of N. J. v. Peluso, 2 Cir., 286 F. 661, certiorari denied 261 U. S. 613, 43 S. Ct. 359, 67 L. ed. 827 10
Central Trust Co. v. Denver & R. G. R. Co., 8 Cir., 97 F. 239, certiorari denied 176 U. S. 683, 20 S. Ct. 1025, 44 L. ed. 638 ..... 13, 31
Chesapeake & O. R. Co. v. Smith, 6 Cir., 40 F. 2d 111, certiorari denied 282 U. S. 856, 51 S. Ct. 32, 75 L. ed. 758 10
Chicago & Alton R. Co. v. Wagner, 239 U. S. 452, 36 S. Ct. 135, 60 L. ed. 379 ..... 32, 33
Chicago & E. I. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 478 ..... 12, 25

Chicago & E. R. Co. v. Meech, 163 Ill. 305, 45 N. E. 290 ..... 12, 25
Chicago & G. T. R. Co. v. Hart, 209 Ill. 414, 70 N. E. 654 ..... 12, 14, 15, 25, 40, 46
Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 S. W. 249 11
Ciacci v. Wooley, 33 Hawaii 247 ..... 11, 21
Clark v. Atchison, T. & S. F. R. Co., 319 Mo. 865, 6 S. W. 2d 954 ..... 13, 38, 39
Cochran v. Pittsburgh & L. E. R. Co. (D. C. Ohio), 31 F. 2d 769 10
Denver & R. G. R. Co. v. Roller, 9 Cir., 100 F. 738 ..... 13, 31
Eker v. Pettibone, 7 Cir., 110 F. 2d 451 10
Erie R. Co. v. Murphy, 2 Cir., 9 F. 2d 525 10
Greinke v. Chicago C. R. Co., 234 Ill. 564, 85 N. E. 327. 10
Hampe v. Versen, 224 Mo. App. 1144, 32 S. W. 2d 793 ..... 9, 19
Hart v. Emery-Bird-Thayer D. G. Co., 233 Mo. App. 312, 118 S. W. 2d 509 ..... 11, 21
Herries v. Bond Stores, Inc., 231 Mo. App. 1053, 84 S. W. 2d 153 ..... 11, 21
Hughes v. Eldorado Coal & Mining Co., 197 Ill. App. 259 ..... 9, 19
Hull v. Philadelphia and Reading R. Co., 252 U. S. 475, 40 S. Ct. 358, 64 L. ed. 670 ..... 32, 33, 34
Illinois Central R. Co. v. Barron, 5 Wall. (72 U. S.) 90, 18 L. ed. 591 ..... 13, 31
Illinois Central R. Co. v. Sheegog, 215 U. S. 308, 317, 30 S. Ct. 101, 54 L. ed. 735 ..... 13, 31
Kansas City Southern R. Co. v. Nectaux, 5 Cir., 26 F. 2d 317, certiorari denied 278 U. S. 621, 49 S. Ct. 24, 73 L. ed. 542 ..... 12, 28, 29
Kirkendall v. Union Pacific R. Co., 8 Cir., 200 F. 197. 10

Lee v. Kansas City Southern R. Co., 8 Cir., 220 F. 863 10
Lowery v. Hocking Valley R. Co., 6 Cir., 60 F. 2d 78.. 10

McCloskey v. Koplar, 329 Mo. 527, 46 S. W. 2d 557..11, 21
McGoffin v. Missouri Pacific R. Co., 102 Mo. 540, 15 S. W. 76..... 10
Magrane v. St. Louis & S. R. Co., 193 Mo. 119, 81 S. W. 1158..... 10
Merchants' Mutual Insurance Co. v. Baring, 20 Wall. (87 U. S.) 159, 22 L. ed. 250.....14, 42, 43

North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591.....9, 12, 14, 15, 16, 27, 35, 41, 46
North Chicago St. R. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899 10
Northern Pacific R. Co. v. Mentzer, 9 Cir., 214 F. 10..13, 31
Nulsen v. National Pigment & Chemical Co., 346 Mo. 1246, 145 S. W. 2d 410.....14, 42

Oscaynan v. Arms Co., 103 U. S. 261, 26 L. ed. 539..9, 18

Pandjiris v. Oliver Cadillac Co., 339 Mo. 711, 98 S. W. 2d 969 .....11, 21
Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 599..12, 15
Price v. Metropolitan St. Ry. Co., 220 Mo. 435, 119 S. W. 932..... 11

Robinson v. Baltimore & Ohio R. Co., 237 U. S. 84, 35 S. Ct. 491, 59 L. ed. 849..... 32
Rouse v. Hornsby, 8 Cir., 67 F. 219..... 10

Sheehan v. Terminal R. Assn., 336 Mo. 709, 81 S. W. 2d 305 .....12, 30
Sheehan v. Terminal R. Assn., 344 Mo. 586, 127 S. W. 2d 657, certiorari denied 308 U. S. 581, 60 S. Ct. 102, 84 L. ed. 487.....13, 30
Smith v. Philadelphia, Baltimore & Washington R. Co., 46 App. (D. C.) 275.....44, 47

Southern R. Co. v. Derr, 6 Cir., 240 F. 73..... 9
Spaw v. Kansas Terminal R. Co., 198 Mo. App. 552, 201 S. W. 927.....13, 30
State ex inf. Attorney General v. Terminal R. Association of St. Louis, 182 Mo. 284, 81 S. W. 395..... 37
State ex rel. Rothrun v. Darby, 345 Mo. 1002, 137 S. W. 2d 532.....14, 43
United States v. Leeburger, 2 Cir., 160 F. 651.....9, 18
United States v. Terminal R. Association of St. Louis, 224 U. S. 383, 56 L. ed. 810..... 37
United States v. Terminal R. Association of St. Louis, 236 U. S. 194, 59 L. ed. 535..... 37
U. S. Shipping Board Emergency Fleet Corporation v. South Atlantic Dry Dock Company, 5 Cir., 19 F. 2d 486 .....9, 18
Van Horn v. Pacific Roofing & Ref. Co., 27 Cal. App. 105, 148 P. 951.....11, 21, 22
Wegman v. Great Northern R. Co., 189 Minn. 325, 249 N. W. 422.....13, 31
Welden Nat'l Bank v. Smith, 2 Cir., 86 F. 398.....13, 31
Wiget v. Becker, 8 Cir., 84 F. 2d 706.....9, 19

Textbooks Cited.

38 Am. Jur., p. 997, Sec. 300.....11, 21
45 C. J., p. 1216, Sec. 781..... 11

Statutes Cited.

Federal Employers' Liability Act (45 U. S. C. A., §§ 51-60) 16
Paragraph 5 (a) of Rule 38 of this Court.....9, 16

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

While the statement of the matter here involved which is made in petitioner's petition for a writ of certiorari and brief in support thereof is not grossly inaccurate or objectionable, we believe that it does omit some of the details which are essential to a correct and proper understanding of the case and the matters here involved. Accordingly, respondent will undertake a statement of her own.

This action was brought by the respondent, Julia C. Miller, administratrix of the estate of Ernest F. Miller, deceased, as plaintiff, against the petitioner, Terminal Railroad Association of St. Louis, as defendant, in the Circuit Court of the City of St. Louis, Missouri, to recover damages under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, 35 Stat. 65, as amended, 45 U. S. C. A. §§ 51-60) for the death of her husband and intestate, Ernest F. Miller, which occurred on July 12, 1940, in East St. Louis, Illinois.

The Pleadings.

The pleadings, while not generally remarkable, should be given some consideration.

The respondent's (plaintiff's) petition (R. 2-4), after alleging the formal matters necessary to bring plaintiff's case within the Federal Employers' Liability Act—including the facts that the intestate was an employee of defendant, that defendant was an interstate railroad, and that both were engaged in interstate commerce—alleged, in substance, that the law of Illinois, as announced in several specified decisions of the Supreme Court of that state, was to the effect that, where the owner of a railroad authorizes or permits another to use its tracks and an injury results from negligent or unlawful operation, the owner and user are jointly and severally liable to the person injured, and the user and his servants become and are the agents and servants of the owner. The petition then further alleged, in substance, that while the intestate was engaged in working upon one of petitioner's freight trains being operated upon and over petitioner's tracks and properties in interstate commerce in East St. Louis, Illinois, on the 12th day of July, 1940, he was killed as the result of a passenger train being operated over and along petitioner's said track and into collision with the rear end of

said freight train; that such collision and death resulted in whole or in part from the negligence and carelessness of the petitioner, its agents, servants and employees other than the intestate, and "that said trains and the movement and operation thereof, and the means, devices and appliances controlling the movement and operation of said trains were within the exclusive custody and control of defendant, its agents, servants and employees, other than said Ernest F. Miller" (R. 4).

The petitioner's (defendant's) answer (R. 5) consisted of a general denial, coupled with a plea that petitioner is a terminal and union depot corporation organized under and subject to Sections 5251 and 5252 of the Revised Statutes of Missouri 1939, "and as such company is not liable for the acts of any railroad company operating over defendant's tracks."

The Evidence.

There is no conflict in the evidence in this case, although respondent does not concede all of the facts tended to be established by some of petitioner's evidence. The evidence of the parties tended to establish the following:

The petitioner is and was a railroad corporation organized under the laws of Missouri (R. 31-32), engaged in interstate commerce (R. 27), and owning numerous railroad tracks and properties in and about the Cities of St. Louis, Missouri, and East St. Louis, Illinois (R. 27). The mainline tracks of the petitioner between these two cities ran in a general easterly and westerly direction, the northernmost of these tracks being known as track No. 71 (Defendant's Exhibit 4, opposite R. 36; R. 42) and was known as the "regular eastbound" track (R. 15, 34-35), while the southernmost of these tracks is known as track No. 72 and is the "regular westbound" track. A train moving eastwardly, between these two cities upon these tracks, enters

a tunnel at Ninth and Poplar streets in the City of St. Louis (R. 44), emerges from that tunnel at Washington avenue (R. 44), immediately enters onto the petitioner's bridge known as the Eads Bridge, which carries the tracks across the Mississippi River, and passes from the bridge proper onto its east approach, which carries the tracks to the Relay Depot in East St. Louis (R. 44-45). At all of the places mentioned petitioner's tracks are within its interlocking switch plant. At or near the entrance to the tunnel aforementioned petitioner has an interlocking plant tower, known as "X-Office" (R. 44); at Washington avenue petitioner has another interlocking plant office known as "MS-Office" (R. 47), and at the east end of the Eads Bridge proper petitioner has another "temporary" interlocking plant office, known as "J-Office" (R. 46, 47),* and at the Relay Depot petitioner has another interlocking plant tower known as "Q-Tower" (R. 46). Petitioner's employees in these towers and offices, under the direction of petitioner's train dispatcher at the "X-Office" tower (R. 44), controlled all of the switches, signals and other devices in petitioner's interlocking plant which controlled all movements of trains upon these tracks between St. Louis and East St. Louis (R. 9, 10, 12-13, 44-47).

On the occasion here involved, and for some years prior thereto, petitioner had authorized and permitted the Receivers for the Mobile & Ohio Railroad Company (hereinafter referred to, for convenience, as the "Mobile & Ohio") to use these tracks, with petitioner's knowledge and consent, under an arrangement whereby petitioner was paid by the Mobile & Ohio compensation for such use upon the same basis as petitioner was paid by other railroads for similar use of these tracks (R. 10-12). Petitioner had rules, respecting the operation of trains over its tracks, which required persons operating those trains to comply

*This "J-Office" was, apparently, not being used on the occasion here involved (R. 47).

with such rules (R. 10), and petitioner had the right to control (R. 10, 20)—and, being in possession and control of all the signals, switches and interlocking devices, had the means to control (R. 9, 10, 12-13)—the movement of all trains operating over any of its tracks.

On the occasion here involved the respondent's intestate, Ernest F. Miller, in the course and scope of his employment by defendant, was riding upon the drawbar at the extreme rear end of the last car of one of petitioner's freight trains (R. 17, 34, 35)—consisting of some thirty cars (R. 41)—being moved eastwardly by petitioner over its main line track No. 72 from one of petitioner's yards in St. Louis, Missouri, to East St. Louis, Illinois (R. 27). After this train had crossed the Eads Bridge proper and was upon the east approach of the bridge, it was brought to a stop by reason of a signal being set against it at "Q-Tower" (R. 17, 33-34), and within two or three minutes thereafter (R. 34, 35) a passenger train of the Mobile & Ohio, consisting of a gas-electric locomotive unit and a passenger car (R. 15), and being operated by persons in the general employ of the Mobile & Ohio (R. 10, 14) in an easterly direction over petitioner's main line track No. 72 at a speed of between ten and fifteen miles an hour (R. 15-16), collided with the rear end of petitioner's freight train with such violence as to cause Miller to be fatally crushed between the two trains (R. 26, 34, 35). The weather was clear at the time of this occurrence (R. 27).

The movement of these two trains eastwardly on petitioner's main line track No. 72—the southernmost of the two tracks there—was "irregular" because eastbound trains ordinarily used track No. 71, the northernmost of those tracks (R. 15, 34).

The conductor of the Mobile & Ohio passenger train, who had just then stepped down onto the rear platform of that train and was some 120 feet from the gas-electric locomotive (R. 15), first observed the standing freight

train when the passenger train was between 180 and 200 feet to the rear of it (R. 15), and he then saw Miller standing on the drawbar on the rear end of the freight train, giving a stop signal (R. 15-16). About that same time the air was set on the passenger train by its engineer, but it did not stop in time to avoid the collision (R. 16). Under the circumstances there existing, it was not customary for the rear man on the freight train—in this instance the decedent, Miller—to get off and go back and flag any train which might be following on the same track (R. 34, 35).

The foregoing facts are wholly without dispute or controversy, and they constitute the substance of the admissions made by the petitioner (defendant), together with the testimony of the respondent's (plaintiff's) witnesses and some of petitioner's (defendant's) witnesses.

In addition to the foregoing, petitioner (defendant) offered the testimony of several witnesses that tended to show that, when its freight train entered the west end of the tunnel at Ninth and Poplar streets in St. Louis, it had a lighted red lantern on the rear end of the last car (R. 45), and the switchman on the rear end—the decedent, Miller—had a small leather paddle, called a "staff," with a number upon it, which had been given him by the yardmaster at the point at which this freight train had originated (R. 45). These devices were used for the purpose of informing petitioner's operators at the Washington avenue, or "MS," interlocking office that the entire train had passed through the tunnel, for, in the absence of the red light or the "staff" being thrown off by the rear switchman there, they would know that the rear part of the train had become detached and was still in the tunnel (R. 45). When the operators at the Washington avenue, or "MS," office would determine from observing the red light on the rear end of a train and from receiving the "staff" thrown from it, that the particular track upon

which that train was moving was clear in the tunnel, they would notify the petitioner's dispatcher at "X-Office," and, until the dispatcher at "X-Office" received such information, he would not let another train enter the tunnel on that track (R. 45). After an eastbound train passed Washington avenue, or "MS," office there was no interlocking signal or device by which a train could be stopped until it reached "Q-Tower" at the relay station in East St. Louis (R. 45-46), unless the temporary "J-Office" at the east end of the bridge proper was open—which it was not on this occasion (R. 46-47).

The petitioner's (defendant's) evidence further tended to establish that, on the occasion here involved, the petitioner's freight train and the Mobile & Ohio passenger train were being operated "irregularly," upon the orders of petitioner's dispatcher at "X-Office," in order to "relieve the congestion" caused by the number of eastbound trains being moved at that particular time (R. 47), in order to "keep things moving" (R. 48), and in order to move the trains "as rapidly as possible and causing as little delay as possible" (R. 34-35), and that the Mobile & Ohio passenger train was sent into the tunnel by defendant's dispatcher at "X-Office" "immediately" upon his being told by the operator at Washington avenue, or "MS," office that the freight train had cleared the tunnel (R. 49).

The testimony of petitioner's (defendant's) superintendent, Mr. Davis, and the exhibits offered in connection therewith, tended to establish that, from experiments conducted by him, it was shown that the engineer of the Mobile & Ohio passenger train would have had a clear and unobstructed view of the rear end of the standing freight train, and the decedent Miller upon it, while still 558 feet away from it (R. 42), and that he could have seen the standing freight train, but could not tell which track it was upon, while he was still 1,890 feet from it (R. 43).

The testimony of this witness also tended to show that, if moving at a speed of from 10 to 15 miles per hour, the Mobile & Ohio train could have been brought safely to a stop, under the existing conditions, in between 90 and 100 feet (R. 40).

Such other of the detailed facts as may be essential to an understanding of any particular point involved here will be considered in our argument upon that point.

The Trial and Subsequent Proceedings.

At the trial the case was submitted upon the res ipsa loquitur doctrine, and the jury was instructed, *inter alia*, that (R. 51):

> "* * * under the law of this case the agents and servants of the Receiver of the Mobile & Ohio Railroad Company, in charge of the passenger train mentioned in evidence, are to be regarded by you as the agents and servants of the defendant."

The jury returned a verdict in favor of the plaintiff (R. 70), and from the judgment entered thereon after remittitur ordered by the trial court (R. 71, 72), the defendant (petitioner here) duly appealed to the Supreme Court of Missouri (R. 71-76).

The Supreme Court of Missouri, in its opinion and decision upon that appeal (Miller v. Terminal R. Assn. of St. Louis [Mo. Sup.], 163 S. W. 2d 1034, not yet officially reported), ruled that the local law of Illinois, pleaded in the petition and to the effect that a lessor or licensor railroad was liable for the acts of its lessees or licensees, and that the latter, and their agents and employees, became and were the agents and servants of the former, was properly applicable to the action, and that the jury had properly been so instructed.

Petitioner now seeks review of this opinion and decision of the Supreme Court of Missouri.

SUMMARY OF THE ARGUMENT.

I.

Petitioner here has stated no sufficient reason for review by writ of certiorari in this case. The sole federal question determined by the Supreme Court of Missouri in the case is one which has heretofore been determined by this Court, and it was determined by the Supreme Court of Missouri in accord with the applicable decision of this Court.

Paragraph 5 (a) of Rule 38 of this Court;
North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591.

II.

Petitioner's counsel having, in his argument to the jury, admitted petitioner's liability (R. 64-66), petitioner cannot now change his theory and contend upon this appeal for error relating to the issue of its liability.

Oscaynan v. Arms Co., 103 U. S. 261, 26 L. ed. 539;
U. S. Shipping Board Emergency Fleet Corporation v. South Atlantic Dry Dock Company, 5 Cir., 19 F. 2d 486;
United States v. Leeburger, 2 Cir., 160 F. 651;
Wiget v. Becker, 8 Cir., 84 F. 2d 706;
Hampe v. Versen, 224 Mo. App. 1144, 32 S. W. 2d 793;
Hughes v. Eldorado Coal & Mining Co., 197 Ill. App. 259;
Arkansas City Canning Co. v. Dunston, 63 Kan. 879, 64 P. 125.

III.

Where the facts of the case are otherwise such as to make the doctrine of res ipsa loquitur applicable, that doctrine is fully applicable in cases under the Federal Employers' Liability Act, such as is the case at bar (R. 8).

Southern R. Co. v. Derr, 6 Cir., 240 F. 73;

Central R. Co. of N. J. v. Peluso, 2 Cir., 286 F. 661, certiorari denied 261 U. S. 613, 43 S. Ct. 359, 67 L. ed. 827;

Baltimore & O. R. Co. v. Kast, 6 Cir., 299 F. 419, certiorari denied 266 U. S. 613, 45 S. Ct. 95, 69 L. ed. 468;

Erie R. Co. v. Murphy, 2 Cir., 9 F. 2d 525;

Cochran v. Pittsburgh & L. E. R. Co. (D. C. Ohio), 31 F. 2d 769;

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Eker v. Pettibone, 7 Cir., 110 F. 2d 451;

Benner v. Terminal R. Assn. (Mo. Sup.), 156 S. W. 2d 657, certiorari denied 315 U. S. 813, 86 L. ed. (Advance Sheets) 668.

IV.

Where the evidence establishes, as it did in this case, that a collision between two trains upon the petitioner railway company's tracks was the cause of the decedent's death, those facts alone ordinarily bring the case within the doctrine of res ipsa loquitur and establish a prima facie case of petitioner's negligence.

Lee v. Kansas City Southern R. Co., 8 Cir., 220 F. 863;

Kirkendall v. Union Pacific R. Co., 8 Cir., 200 F. 197;

Rouse v. Hornsby, 8 Cir., 67 F. 219;

Greinke v. Chicago C. R. Co., 234 Ill. 564, 85 N. E. 327;

North Chicago St. R. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899;

McGoffin v. Missouri Pacific R. Co., 102 Mo. 540, 15 S. W. 76;

Magrane v. St. Louis & S. R. Co., 193 Mo. 119, 81 S. W. 1158;

Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 S. W. 249;
Price v. Metropolitan St. Ry. Co., 220 Mo. 435, 119 S. W. 932.

V.

Notwithstanding that the passenger train in the case at bar was being operated by persons in the general employ of the Receiver for the Mobile & Ohio Railroad Company, the petitioner was in "exclusive control" of all the instrumentalities here involved, so as to make the doctrine of res ipsa loquitur fully applicable, because:

(A) The requirement of the res ipsa loquitur doctrine that the instrumentalities under the control of the defendant refers to the right of control, and does not mean, and is not limited to, actual physical control; and the evidence establishes petitioner's right of control over all of the instrumentalities involved, including the Mobile & Ohio passenger train.

38 Am. Jur., p. 997, Sec. 300;
45 C. J., p. 1216, Sec. 781;
McCloskey v. Koplar, 329 Mo. 527, 46 S. W. 2d 557;
Pandjiris v. Oliver Cadillac Co., 339 Mo. 711, 98 S. W. 2d 969;
Herries v. Bond Stores, Inc., 231 Mo. App. 1053, 84 S. W. 2d 153;
Hart v. Emery-Bird-Thayer D. G. Co., 233 Mo. App. 312, 118 S. W. 2d 509;
Van Horn v. Pacific Roofing & Ref. Co., 27 Cal. App. 105, 148 P. 951;
Ciacci v. Wooley, 33 Hawaii 247.

(B) In legal effect, the persons operating the Mobile & Ohio passenger train were the agents and servants of petitioner, so that petitioner had actual physical control over that train.

(1) Under the local law in Illinois, the place where this cause of action concededly arose (R. 8, 27), which was pleaded in the petition (R. 2-3), this petitioner, as the owner of the railroad upon which this collision occurred, was liable for an injury resulting from the use of its tracks by its lessee or licensee, the Mobile & Ohio, and the Mobile & Ohio and its agents and employees became and were the agents and servants of the petitioner.

Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 599;
Chicago & E. R. Co. v. Meech, 163 Ill. 305, 45 N. E. 290;
Anderson v. West Chicago S. R. Co., 200 Ill. 329, 65 N. E. 717;
Chicago & G. T. R. Co. v. Hart, 209 Ill. 414, 70 N. E. 654;
Chicago & E. I. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 478;
Armstrong v. Chicago & W. I. R. Co., 350 Ill. 426, 183 N. E. 478, certiorari denied 289 U. S. 724, 53 S. Ct. 523, 77 L. ed. 1475.

(2) This Court, the lower federal courts, the Illinois courts, the Missouri courts, and the courts of other states, have all ruled that such a rule of local law is applicable in cases under the Federal Employers' Liability Act, such as is the case at bar, under circumstances similar to those in the case at bar.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591;
Kansas City Southern R. Co. v. Nectaux, 5 Cir., 26 F. 2d 317, certiorari denied 278 U. S. 621, 49 S. Ct. 24, 73 L. ed. 542;
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Wegman v. Great Northern R. Co., 189 Minn. 325, 249 N. W. 422;
Barnes v. Red River & G. R. Co., 14 La. App. 188, 128 So. 724.

(3) Even should the rule of law announced in the decisions of the federal courts, rather than the rule in Illinois, be deemed to apply, the result would be the same, because the two rules are identical.

Illinois Central R. Co. v. Barron, 5 Wall. (72 U. S.) 90, 18 L. ed. 591;
Illinois Central R. Co. v. Sheegog, 215 U. S. 308, 317, 30 S. Ct. 101, 54 L. ed. 735;
Welden Nat'l Bank v. Smith, 2 Cir., 86 F. 398;
Central Trust Co. v. Denver & R. G. R. Co., 8 Cir., 97 F. 239, certiorari denied 176 U. S. 683, 20 S. Ct. 1025, 44 L. ed. 638;
Denver & R. G. R. Co. v. Roller, 9 Cir., 100 F. 738;
Northern Pacific R. Co. v. Mentzer, 9 Cir., 214 F. 10.

VI.

(A) The fact is that the petitioner here is a terminal railroad company, and not a mere union station company organized under Sections 5251 and 5252, Revised Statutes of Missouri 1939, and the fact that it is a terminal railroad company does not in the least affect its liability under the rule that a lessor or licensee railroad is liable for the acts of its lessees or licensees. Relief from that rule can be obtained only by express statutory authority.

Clark v. Atchison, T. & S. F. R. Co., 319 Mo. 865, 6 S. W. 2d 954;

Chicago & G. T. R. Co. v. Hart, 209 Ill. 414, 70 N. E. 654;
North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591.

(B) In point of fact, irrespective of the mode of its incorporation, the petitioner was operating as an interstate common carrier by railroad so as to make the Federal Employers' Liability Act and the general rules of law relating to railroads applicable to it. At the very moment of decedent's death petitioner's employees, including decedent, were moving one of its freight trains from St. Louis, Missouri, to East St. Louis, Illinois.

VII.

(A) The purported defense that the use of petitioner's tracks by the Mobile & Ohio was "involuntary" on petitioner's part, and that petitioner is thereby relieved of liability under the general rule respecting a lessor or licensor railroad's liability for the act of its lessees or licensee, is not available to the petitioner here because:

(1) Such purported defense is an affirmative defense which was not pleaded by petitioner.

Merchants' Mutual Insurance Co. v. Baring, 20 Wall. (87 U. S.) 159, 22 L. ed. 250;
Nulsen v. National Pigment & Chemical Co., 346 Mo. 1246, 145 S. W. 2d 410.

(2) There is no evidence in the record to support any such defense.

Merchants' Mutual Insurance Co. v. Baring, 20 Wall. (87 U. S.) 159, 22 L. ed. 250;
State ex rel. Rothrum v. Darby, 345 Mo. 1002, 137 S. W. 2d 532.

(B) In any event, there being no express statutory authority relieving petitioner of the liability cast upon a lessor or licensor railroad for the acts of its lessees and licensees, the petitioner remains within the general rule.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591;

Chicago and G. T. R. Co. v. Hart, 209 Ill. 414, 70 N. E. 654.

ARGUMENT.

I.

At the very outset of our argument we desire to point out that the petitioner here has failed to state any sufficient reason for granting review of this case on writ of certiorari.

It is elementary, and announced by paragraph 5 (a) of Rule 38 of this Court, that review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor, such as where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with the applicable decisions of this Court.

The only federal question involved in this case which was determined by the Supreme Court of Missouri is whether a dominant rule of local law, which makes a lessor or licensor railroad liable for the acts of its lessees or licensees and constitutes the servants and employees of the lessees or licensees the agents and servants of the lessor or licensor, is applicable to cases under the Federal Employers' Liability Act (45 U. S. C. A., §§ 51-60). The Supreme Court of Missouri ruled that question in the affirmative upon the authority of North Carolina Railroad Company v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591, which is squarely in point, and which has never been weakened nor departed from in the slightest, so far as we have been able to determine. Accordingly, it is apparent at the outset that the Missouri court has decided a federal question which heretofore has been determined by this Court, and has decided it in accord with the applicable decision of this Court, so there is, therefore, no sufficient ground for review of the Missouri court's opinion and decision by writ of certiorari.

However, let us here point out that, as we will hereinafter discuss at greater length (post, pp. 31-32), even if the Missouri court was in error in holding that the dominant rule of local law was applicable, and even if the rule of law announced in the federal decisions should have been applied, the result would have been the same, because the two rules of law are identical, and review of the Missouri court's opinion and decision by writ of certiorari would, therefore, serve no useful purpose.

The fact of the matter is, we most respectfully submit, that petitioner seeks review of the Missouri court's opinion and decision not because petitioner has any legally sufficient reason therefor, but merely because petitioner is dissatisfied with that opinion and decision.

II.

Before undertaking our discussion of the various questions presented by petitioner's petition for writ of certiorari and brief in support thereof, we are constrained to point out another matter which, we believe and most respectfully submit, precludes consideration of any error alleged by petitioner as a ground for review.

Without setting it out here verbatim, we direct the attention of this Honorable Court to the argument made to the jury by petitioner's counsel, Mr. Sheppard, at the close of the trial below (R. 64-66). That argument was, we submit, a plain, unambiguous and unqualified admission of petitioner's (defendant's) liability to this respondent (plaintiff) for damages for the death of her decedent, made in an attempted display of fairness for the purpose of attempting to minimize the amount of the verdict by seeking to gain favor with the jury through such display of fairness coupled with a plea for equal fairness on the part of the jury. Can petitioner reverse the position taken by its counsel at the trial, adopt a new set of theories of

nonliability, and attempt to secure a review upon those theories which, in view of the admission of liability, had no place in the trial of the case? We respectfully submit not!

Certainly, at this late date no citation of or quotation from the authorities is necessary to support the principle that in an appellate court a party cannot assume an attitude inconsistent with that taken by him at the trial, but he will be restricted to the theory adopted by him below. As part and parcel of that principle, the rule has become settled that a party is bound by a statement of facts, or an admission, made by his counsel in open court, so as to preclude consideration of any contention which is inconsistent with such a statement or admission. In Oscaynan v. Arms Co., 103 U. S. 261, 263, 26 L. ed. 539, this Honorable Court said:

> "The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced. * * * In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. * * * Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof."

In U. S. Shipping Board Emergency Fleet Corp. v. South Atlantic Dry Dock Co., 5 Cir., 19 F. 2d 486, 489, the Court said:

> "A fact **or conclusion** admitted by a party in the trial court for the purposes of the trial is not open to be controverted or put in issue by that party in the appellate court." (Emphasis ours.)

In United States v. Leeburger, 2 Cir., 160 F. 651, one of the syllabi, which is fully supported by the opinion, reads:

> "A question of fact cannot be raised on appeal which was conceded in the argument in the court below."

See, also, Wiget v. Becker, 8 Cir., 84 F. 2d 706, 709, 711; Hampe v. Versen, 224 Mo. App. 1144, 32 S. W. 2d 793; Hughes v. Eldorado Coal & Mining Co., 197 Ill. App. 259; Arkansas City Canning Co. v. Dunston, 63 Kan. 879, 64 P. 1025.

Accordingly, we most respectfully submit that since petitioner's counsel made a clear and unqualified admission of petitioner's liability in his argument to the jury at the trial, petitioner is here bound by such admission so as to preclude review of its present contentions of nonliability.

III AND IV.

Notwithstanding the firmness of our convictions that, because of what we have heretofore said, certiorari should not be granted in this case, we feel that prudence requires that we answer petitioner's contentions upon the issue of its liability, in order to further demonstrate the futility of further review of this case. In answering these contentions of petitioner we shall not follow the exact order in which they are presented by petitioner, but shall discuss the matters involved in an order in which we consider more convenient and understandable.

Bearing in mind that respondent's (plaintiff's) case was one which was pleaded, proven and submitted under the doctrine of res ipsa loquitur, let us first point out two legal propositions which are well established:

1. The doctrine of res ipsa loquitur may be invoked in an action under the Federal Employers' Liability Act, as is the case at bar, where the facts of the case are such as to make it a proper one for the application of that doc-

trine. All of the authorities cited under point III of our summary or argument in this case (ante, pp. 9-10) so hold.

2. Ordinarily, where a case involves a collision between two trains upon the same track, the fact of the collision makes a prima facie case of negligence, and the case is a proper one for the application of, and within, the doctrine of res ipsa loquitur. All of the authorities cited under point IV of our summary of argument herein (ante, pp. 10-11) so hold.

V.

The petitioner, while tacitly conceding the two propositions just stated, contends, in substance, that it is not liable in this case under the doctrine of res ipsa loquitur because, it asserts, it did not have exclusive control over the instrumentalities producing the injury, and, in particular, over the Mobile & Ohio passenger train, and that, therefore, the fact of the collision, while making a prima facie case of negligence, does not point to the negligence of petitioner as the proximate cause of the collision. This contention is based upon petitioner's thought that, in the absence of a "conventional" relationship between petitioner and the engineer of the Mobile & Ohio train, petitioner could not be liable for such engineer's acts, coupled with the further thought that the sole cause of the injury was the negligence of the engineer.

While the respondent does not concede that the sole cause of the death of her intestate was negligence on the part of the engineer operating the Mobile & Ohio train, and while respondent is convinced that the evidence was sufficient to permit a finding that negligence on the part of some of petitioner's regular employees in charge of and operating petitioner's interlocking plant concurred and cooperated in bringing about the death of her intestate so as to fix liability upon petitioner, yet the basic position of

respondent is that the petitioner had exclusive control over all the instrumentalities here involved for two reasons, viz.: (1) Even if the petitioner did not have actual physical control of the Mobile & Ohio train in that it did not have its regular employees operating that train, it had the right of control over that train, as well as over all the other instrumentalities here involved, which was sufficient to meet the requirements of the res ipsa loquitur doctrine, and (2) under the applicable principles of law, the persons in charge of and operating the Mobile & Ohio passenger train were the agents and servants of the defendant, so that defendant had actual physical control of that train, as well as actual physical control of all the other instrumentalities involved.

(A) Petitioner Had the "Right of Control" Over All the Instrumentalities Involved.

In 38 Am. Jur., p. 997, Sec. 300, in speaking of the requirement of the res ipsa loquitur doctrine that all of the instrumentalities involved must be under the control of the defendant, it is said:

> "The requirement that the instrumentalities be under the management and control of the defendant **does not mean, or is not limited to actual physical control, but refers rather to the right of control** at the time of the accident." (Emphasis ours.)

And this quotation has ample support in the authorities (Cf. McCloskey v. Koplar, 329 Mo. 527, 46 S. W. 2d 557, 560; Pandjiris v. Oliver Cadillac Co., 339 Mo. 711, 98 S. W. 2d 969, 973; Herries v. Bond Stores, Inc., 231 Mo. App. 1053, 84 S. W. 2d 153, 156-157; Hart v. Emery-Bird-Thayer D. G. Co., 233 Mo. App. 312, 118 S. W. 2d 509, 511; Van Horn v. Pacific Ref. & Roofing Co., 27 Cal. App. 105, 148 P. 951, 953; Ciacci v. Wooley, 33 Hawaii 247, 35 C. J., p. 1216, § 781).

The reason for the rule is aptly stated in Van Horn v. Pacific Ref. & Roofing Co., supra, wherein it was said:

> "The rule * * * to the effect that the exclusive control and management of the appliances causing the injury must be shown to have been in the defendant, must be taken to refer to the right of such control; otherwise * * * the doctrine of res ipsa loquitur could seldom if ever be given application."

What are the facts in the case at bar with reference to petitioner's right of control over the instrumentalities which produced the injuries to, and death of, the respondent's intestate, and particularly over the Mobile & Ohio train? It was, and is, admitted and conceded that petitioner had sole and exclusive control over the petitioner's tracks upon which the two trains were being operated, as well as over all the appliances used in the operation of those tracks (R. 9); that the petitioner had sole and exclusive control over, and charge of the operation of, all of the signals and switches which governed and controlled the movements of trains over and upon petitioner's tracks in petitioner's interlocking plant in which this collision occurred (R. 12); that the petitioner had "actual physical control" over, and was operating through persons in its general employ, the freight train upon which deceased was working when he was killed (R. 9); that the petitioner had various rules respecting the operation of trains over its tracks, which applied to all trains which were operated over those tracks, whether so operated by persons in the general employment of petitioner or by other persons under an arrangement with petitioner, and which rules "require persons operating those trains to comply with those rules" (R. 10); that petitioner had the right to control the movements of all trains which were operated over its tracks, and to control when any of such trains should or should not use any

particular track (R. 10); and that the passenger train involved in this collision was being operated, by persons in the general employ of the Receivers of the Mobile & Ohio Railroad Company, over petitioner's tracks, with the knowledge and consent of petitioner, and under an arrangement of long standing between petitioner and such Receivers, whereby petitioner was paid by such Receivers for such use of the tracks (R. 10-12).

In addition to the foregoing admissions there was evidence offered by petitioner showing that, by the aforementioned rules of petitioner, it reserved to itself the method and manner of operation of all trains operated over and upon its tracks, including even the speed of such trains, and there was undisputed and uncontradicted testimony of the conductor in charge of the Mobile & Ohio passenger train, who was offered as a witness for respondent, that the persons in charge, and the movements, of the Mobile & Ohio passenger train were under petitioner's control while such train was on petitioner's property, such conductor's testimony in that connection being as follows (R. 20):

> "Q. Now, are you examined by the Terminal, examined from time to time by the Terminal Railroad Association on the Terminal Railroad Association's rules? A. We are.
>
> Q. And you are subject, while on their property, to their rules, are you? A. Exactly.
>
> Q. In other words, **they control your movements on their property** and you are subject to their rules; that is right, isn't it? A. Yes, sir." (Emphasis supplied.)

We cannot understand how there could be made a clearer or better showing of petitioner's right of control over the instrumentalities involved in this case, and particularly over the Mobile & Ohio train, than is made by the foregoing facts. Those facts not only demonstrate petitioner's conceded right of control and actual physical

control over all of the instrumentalities involved, excepting the Mobile & Ohio train, but they clearly demonstrate that the petitioner had the absolute right of control over every detail of the movement of the Mobile & Ohio train upon petitioner's tracks. By its conceded physical control over all the various switches in its tracks petitioner controlled whether the Mobile & Ohio train should or should not use any particular track; by its conceded physical control over all the various signals controlling the movement of trains upon its various tracks petitioner controlled the time when the Mobile & Ohio train could and could not move upon any particular track, as well as the direction of any such movement; and by its rules and regulations, which were concededly controlling upon the persons in charge of the Mobile & Ohio train, the petitioner had the right of control over the manner of operation of that train, even down to such minor details as regulating its speed at various places upon petitioner's tracks. Accordingly, we most respectfully submit that the petitioner had the complete right of control over the Mobile & Ohio passenger train, as well as over all the other instrumentalities here involved, so as to make petitioner responsible for the method and manner of the operation of that train, so as to make the fact of the collision between the two trains point to the negligence of the defendant as the proximate cause of the accident, and so as to make the doctrine of res ipsa loquitur fully applicable.

(B) In Legal Effect, the Persons Operating the Mobile & Ohio Train Were Agents and Servants of Petitioner, So That Petitioner Had Actual Physical Control Over That Train.

The principles of law applicable to the facts of this case establish the status of the persons operating the Mobile & Ohio train as agents and servants of the petitioner, so

as to put petitioner in actual physical control of that train, and cast upon petitioner liability for any negligent operation thereof.

The respondent (plaintiff) pleaded in her petition (R. 2-3) the rule of law of Illinois announced in several decisions of the Supreme Court of that state,* to the effect that, where the owner of a railroad authorizes or permits another to use its tracks and an injury results from negligent or unlawful operation, the owner and user are jointly and severally liable to the person injured, and the user and his agents and servants become and are the agents and servants of the owner. In the first of these cases, Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559, 560-561, it was said:

> "* * * where injury results from the negligence or unlawful operation of the railroad, whether by the corporation to which the franchise is granted, or by another corporation, or by individuals, whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable (citing many cases). * * * The public may look for indemnity for injury resulting from the wrongful or unlawful operation of the road to that corporation to which they have granted a franchise, and thus delegated a portion of the public service; and for this purpose **the company whom it permits to use its tracks, and its servants and employees, will be regarded as the servants and agents of the owner company.**" (Emphasis ours.)

The other Illinois decisions pleaded in plaintiff's petition are to like effect, as a most cursory examination of them will show, and we refrain from discussing them at length here because your petitioner tacitly, if not actually, con-

*Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559; Chicago & Erie R. Co. v. Meech, 163 Ill. 305, 45 N. E. 290; Anderson v. West Chicago St. R. Co., 200 Ill. 329, 65 N. E. 717; Chicago & G. T. R. Co. v. Hart, 209 Ill. 414, 70 N. E. 654; Chicago & E. I. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050; Armstrong v. Chicago & W. I. R. Co., 350 Ill. 426, 183 N. E. 478, certiorari denied 289 U. S. 724, 53 S. Ct. 523, 77 L. ed. 1475.

cedes the Illinois law to be as pleaded and contended for by respondent.

Is this rule of local law applicable to cases under the Federal Employers' Liability Act? Petitioner contends that it is not—it being petitioner's position that, since this action is one under the Federal Employers' Liability Act, it is to be governed and controlled by the applicable principles of law as announced and declared in the decisions of the federal courts, rather than those of the courts of the state in which the cause of action arose, and that, therefore, the rule of law announced in the Illinois decisions is not applicable here. It is the respondent's position that, while no state statute or local rule of law which is repugnant to the terms of the Federal Employers' Liability Act can be used to modify or defeat that act, yet it is equally true that dominant rules of local law and state statutes which do not contravene the terms of the federal act are controlling in many instances. This is as it should be. The dominant rule of local law of the State of Illinois here involved does not conflict with the letter or the spirit of the Federal Employers' Liability Act; that rule simply made the lessees or licensees of the petitioner—that is to say, the Receivers of the Mobile & Ohio Railroad Company—and the employees of such lessee or licensee, the agents and servants of the petitioner while operating trains over petitioner's tracks. Certainly that rule of law, or state statute to like effect, cannot be set aside for no good reason. That rule of law, like any other rule of law, was binding upon both of these railroads, just as effectively as if there were a written contract between the two railroads to the same effect as the rule of local law. If there had been offered in evidence a written contract between the Receivers of the Mobile & Ohio Railroad Company and the petitioner, stating that it was agreed between them that the said Receivers and their employees would for all purposes be deemed the agents and servants

of the petitioner when operating trains upon petitioner's tracks, that contract would have had no greater or less dignity than the rule of local law in Illinois, and the application of such a contract could not be denied in an action brought under the Federal Employers' Liability Act. Likewise, the application of such a rule of local law cannot be denied in such a case.

The leading case upon this point is the decision in North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591, a case which, so far as we have been able to determine, has never been weakened as an authority. In that case this Honorable Court, in holding the Federal Employers' Liability Act to be applicable, applied a rule of local law announced by the courts of the State of North Carolina which, like the Illinois rule involved in the case at bar, made a lessor or licensor railroad liable for the acts of its lessees and licensees, and their servants and employees. In reversing the ruling of the state court which had held the Federal Employers' Liability Act not to be applicable, this Honorable Court said (232 U. S., l. c. 257-258):

> "The court based its decision that the Federal act did not apply, in part upon the ground that the North Carolina Railroad is not an interstate railroad * * *. The responsibility of the lessor for all acts of negligence of the lessee occurring in the conduct of business on the lessor's road, as established by the same court in Logan v. Railroad, 116 No. Car. 940, was recognized—indeed reasserted. 'But,' it was said, 'that is because a railroad corporation cannot escape its responsibility by leasing its road. It is still liable for its lessee's acts of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either.' 156 No. Car. 500.
>
> "It is plain enough, however, that the effect of the rule thus laid down, especially in view of the grounds upon which it is based, is, that **although a railroad**

> **lease as between the parties may have the force and effect of an ordinary lease, yet with respect to the railroad operations conducted under it, and everything that relates to the performance of the public duties assumed by the lessor under its charter, such a lease—certainly so far as concerns the rights of third parties, including employes as well as patrons—constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or in intrastate commerce, the lessor is responsible.** This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the lessor is a 'common carrier by railroad engaging in commerce between the States,' and that the deceased was 'employed by such carrier in such commerce,' within the meaning of the Federal act * * *." (Emphasis ours.)

Following the decision in the Zachary case, supra, the lower federal courts have recognized the applicability of a rule of local law, such as is here involved, in cases under the Federal Employers' Liability Act.

A situation identical with that presented in the case at bar arose in Kansas City Southern R. Co. v. Nectaux, 5 Cir., 26 F. 2d 317, in which the plaintiff, an engineer in the employ of the defendant, was injured while engaged in interstate commerce as the result of the train which he was operating upon defendant's road being collided with by a negligently-operated train of the Gulf Coast Lines, which was being operated over defendant's tracks by persons in the general employ of the Gulf Coast Lines under a joint trackage right agreement between the two railroads. Plaintiff brought suit against his employer under the Federal Employers' Liability Act and recovered a judgment, and in affirming that judgment the Circuit Court of Appeals for the Fifth Circuit said (26 F. 2d, l. c. 319):

> "It is settled that a railroad is responsible to a passenger for damages occasioned by the negligence of a licensee using its tracks. Illinois Central R. R.

v. Barron, 5 Wall. 90, 18 L. Ed. 591. The decisions are not harmonious in applying this rule to an employee, but in Louisiana an employee of a railroad permitting another to use its tracks jointly may recover from his employer for injuries caused by the negligence of the agents of the licensee * * *. It is not necessary that the technical relation of lessor and lessee, in the sense that the entire operation of the road is turned over to the lessee, should exist. The rule is the same if there is contemporaneous joint usage of the road. Ingram v. La. & N. W. R. Co., 128 La. 933, 55 So. 580; Taylor v. La. & N. W. R. Co., 129 La. 113, 55 So. 732; Bailey v. La. & N. W. R. Co., 129 La. 1029, 57 So. 325. **A rule of local law imposing liability may be enforced in suits under the Federal Employers' Liability Act.** North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914 C, 159." (Emphasis ours.)

The foregoing decision is not only squarely in point with the case at bar, but review of that decision by writ of certiorari was denied by this Honorable Court in Kansas City Southern R. Co. v. Nectaux, 278 U. S. 621, 49 S. Ct. 24, 73 L. ed. 542.

Also, following the decision of this Court in the Zachary case, supra, the Illinois Supreme Court, in Armstrong v. Chicago & W. I. R. Co., 350 Ill. 426, 183 N. E. 478, applied the Illinois common-law rule making a lessor railroad liable for the acts of its lessees and their servants and employees, in an action under the Federal Employers' Liability Act. In that case the action was brought against the Chicago & W. I. R. Co. and the Chicago & E. I. R. Co. for the death of plaintiff's intestate, who was a conductor in the employ of the former and who had been killed as a result of negligence on the part of the latter in its operation of trains and cars on its tracks over which the train upon which the deceased was working when killed was being operated under an arrangement between the two railroad companies. The Illinois Supreme Court, in holding

both railroad companies liable, said (183 N. E., l. c. 480-481):

> "The principle is thoroughly established that where an injury results from the negligent or unlawful operation of a railroad, whether by the owner or by another whom the owner authorizes or permits to use its tracks, both railroad companies are liable to respond in damages to the person injured * * *. The lessor and lessee are not only jointly and severally liable to the general public, but the rule embraces employees * * * and, although the relation of lessor and lessee is not shown to exist, the rule applies to cases where the owner permits another railroad to use its tracks * * *. The C. & E. I. Ry. Co. was engaged in interstate commerce while using the switch yards of the C. & W. I. R. Co. and **under the rule both defendants are liable under the Federal Employers' Liability Act.** North Carolina Railroad Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591, Ann. Cas. 1914 C, 159." (Emphasis supplied.)

Review of the last-mentioned decision by writ of certiorari was, also, denied by this Honorable Court in 289 U. S. 724, 53 S. Ct. 523, 77 L. ed. 1475.

In Missouri, where the instant case was tried, there are statutes* which are identical with the common-law rule in Illinois making the agents and servants of a lessee or licensee railroad the agents and servants of the lessor or licensor railroad. These statutes have been held to be applicable in actions under the Federal Employers' Liability Act by the Missouri courts, so as to make a lessor or licensor railroad liable to its employees for injuries sustained as the result of negligence of a lessee or licensee railroad (Cf. Sheehan v. Terminal R. Assn. of St. Louis, 336 Mo. 709, 81 S. W. 2d 305; Sheehan v. Terminal R. Assn. of St. Louis, 344 Mo. 586, 127 S. W. 2d 657, certiorari denied 308 U. S. 581, 60 S. Ct. 102, 84 L. ed. 487; Spaw v.

*Now Sections 5162 and 5163, R. S. Mo. 1939.

Kansas City Terminal R. Co., 198 Mo. App. 552, 201 S. W. 927, 929-930).

The courts of other states have, likewise, ruled that a rule of local law making a lessor or licensor railroad liable for the acts of its lessees or licensees, and their servants and employees, is applicable in actions under the Federal Employers' Liability Act, in cases where the facts were substantially identical to those in the case at bar (Cf. Wegman v. Great Northern R. Co., 189 Minn. 325, 249 N. W. 422, 423; Barnes v. Red River & G. R. Co., 14 La. App. 188, 128 So. 724).

From the foregoing decisions it is quite apparent that the Illinois rule making a lessor or licensor railroad liable for the acts of its lessees or licensees, and their servants and employees, is properly applicable to the case at bar and that, by the application of that rule to the facts in this case, the persons operating the Mobile & Ohio train were given the status of agents and servants of the petitioner so as to put petitioner in full control of the Mobile & Ohio train and liable under the Federal Employers' Liability Act to any of petitioner's employees negligently injured thereby.

Furthermore, and in any event, if the rule of the federal courts should be applied in this connection, rather than the rule of the Illinois courts, that would not alter one iota what we have hereinbefore said, because, as is apparent from an examination of the decisions of this Honorable Court and of the lower federal courts set out in the footnote below,* the federal courts have long been committed to the doctrine, which is identical with that announced by

*Illinois Central R. Co. v. Barron, 5 Wall. (72 U. S.) 90, 18 L. ed. 591, commented upon at length in Southern R. Co. v. Hussey, 8 Cir., 42 F. 2d 70, 72, and most recently cited in Southern R. Co. v. Hussey, 283 U. S. 136, 139, 51 S. Ct. 367, 75 L. ed. 908, 911; Illinois Central R. Co. v. Sheegog, 215 U. S. 308, 317, 30 S. Ct. 101, 54 L. ed. 735; Welden National Bank v. Smith, 2 Cir., 86 F. 398, 401; Central Trust Co. v. Denver & R. G. R. Co., 8 Cir., 97 F. 239, 242, certiorari denied 176 U. S. 683, 20 S. Ct. 1025, 44 L. ed. 638; Denver & R. G. R. Co. v. Roller, 9 Cir., 100 F. 738, 745; Northern Pacific R. Co. v. Mentzer, 9 Cir., 214 F. 10, 15.

the Illinois courts, that a lessor or licensor railroad is liable for the acts of its lessees or licensees, and their servants and employees, in railroad operations upon the former's railroad.

Petitioner's Contentions and Authorities Discussed.

Petitioner here seeks to avoid the effect of what we have just said by asserting that there must be a "conventional" relationship of employer and employee between the carrier and *the person causing the injury* in order for the Federal Employers' Liability Act to be applied in a case where a "conventional" employee of the carrier is injured or killed. In support of this assertion petitioner relies upon the decisions in Robinson v. Baltimore & Ohio R. Co., 237 U. S. 84, 35 S. Ct. 491, 59 L. ed. 849; Chicago & Alton R. Co. v. Wagner, 239 U. S. 452, 36 S. Ct. 135, 60 L. ed. 379, and Hull v. Philadelphia and Reading R. Co., 252 U. S. 475, 40 S. Ct. 358, 64 L. ed. 670. None of these decisions, however, involve the question of the relationship which must exist between the carrier and *the person causing the injury* in Federal Employers' Liability cases. Those decisions deal only with the relationship which must exist between the carrier and *the person injured or killed* in order for the Federal Employers' Liability Act to be applicable; they are otherwise distinguishable from the case at bar, as shall presently appear, and, even if they rule that a "conventional" relationship must exist between a carrier and the person injured or killed—which we do not concede—they in effect are overruled by later decisions of this Honorable Court.

The decision in Robinson v. Baltimore & Ohio R. Co., supra, relied upon by petitioner, is not in point, because in that case the *plaintiff was not an employee of any railroad,* either in fact or in law, but was a Pullman porter,

and the Federal Employers' Liability Act was correctly held, because of its specific terms, to be limited in its application to railroad employees.

The decision in Chicago & Alton R. Co. v. Wagner, supra, is not in point for the reason that the action there was not predicated by plaintiff upon any status of his as an employee of the defendant so as to be entitled to the benefits of the Federal Employers' Liability Act, and this is clearly shown by the opinion, where, in discussing the inapplicability of the Federal Employers' Liability Act to the case, this Court said (239 U. S., l. c. 456):

> "**The action was not brought under that act.** There were allegations in the original declaration to the effect that Wagner at the time of the injury was engaged in interstate commerce as an employee of the Burlington company, but it seems to have been agreed upon the trial that the action was not governed by the Federal statute; and this indeed was manifest, as the Burlington company was not a party to the action and the Alton company was not the plaintiff's employer. Robinson v. Balt. & Ohio R. R., 237 U. S. 84, 91. **It was tried as a common-law action on the case.**" (Emphasis ours.)

A most casual reading of the decision in Hull v. Philadelphia & Reading R. Co., supra, will readily distinguish that case from the case at bar. In that case it was contended that Hull, the plaintiff's decedent, at the time of his death was in the employ of the Philadelphia & Reading R. Co., although it was conceded that at the same time he was in the general employment of the Western Maryland Railway Co. This contention was based upon the fact that the two railroads above mentioned had entered into a contract with reference to their respective employees. The only question in the case was whether or not Hull, at the time he met his injury and death, was, *by vir-*

tue of this contract between the two railroads, employed by the defendant, Philadelphia & Reading R. Co. This Honorable Court held that Hull was not an employee of the Philadelphia & Reading R. Co., and that the contract between the railroad companies did not make him such an employee, and that, accordingly, the Federal Employers' Liability Act did not apply because there was no relationship of employee and employer between the parties to the action. In the case at bar, however, there never has been, and cannot be, any dispute about the fact that the deceased, Ernest F. Miller, was at all times in the employ of the petitioner, Terminal Railroad Association of St. Louis, and was at the time of his injury engaged in the course and scope of his employment and engaged in the furtherance of interstate commerce for the petitioner. It is, however, interesting to note that the decision in the Hull case, supra, fully supports our contention that a rule of local law may control the liability in a case brought under the Federal Employers' Liability Act. The Hull case makes it clear that whenever a rule of local law, such as is here involved, does exist, it will be recognized and applied in an action brought under the Federal Employers' Liability Act, for this Court in the Hull case distinctly says (252 U. S., l. c. 480):

> "North Carolina R. R. Co. v. Zachary, 232 U. S. 248, is cited, but is not in point, **since in that case the relation of the parties was controlled by a dominant rule of local law,** to which the agreement here operative has no analogy." (Emphasis ours.)

Now, even if the decisions relied upon by petitioner may be said to hold that there must be a "conventional" relationship of employer and employee between the carrier and the person injured or killed in order for the Federal Employers' Liability Act to be applicable—which we do not concede—those decisions are not only not in point here,

but they are out of harmony with the earlier decision in North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591, and the other cases hereinbefore relied upon by this respondent, and they are in that respect in effect overruled by the later decision of this Honorable Court in Baltimore & O. S. W. R. Co. v. Burtch, 263 U. S. 540, 44 S. Ct. 165, 68 L. ed. 433. A "conventional" relationship of employer and employee is, of course, one where one person is working for another under an express agreement, compact, stipulation or contract, whereby the latter has agreed to compensate the former for his services. But this Court, in Baltimore & O. S. W. R. Co. v. Burtsch, supra, clearly held that a bystander, who was at the time of his injury assisting in unloading heavy freight at the request of the conductor of the railroad company's train, was for the time being an employee of the railroad and entitled to the benefits of the Federal Employers' Liability Act as such. Obviously, the relationship of employer and employee was there implied by operation of law, and was not a "conventional" one, and obviously, too, in the case at bar, the relationship of principal and agent, or of master and servant, between petitioner and the engineer of the Mobile & Ohio train was implied by operation of the rule of local law in Illinois—or, for that matter, by the rule of law announced in the decision of the federal courts, for the two are the same—which makes a lessee or licensee railroad, and its employees engaged in operations upon the road of a lessor or licensor railroad, the agents and servants of the lessor or licensor.

To briefly summarize our points III to V, inclusive, we most respectfully submit that, under the authorities, whether the rule announced by the Illinois courts or that announced by the federal courts be applied, the two rules being identical, the petitioner here was in control of and liable for the operation of the Mobile & Ohio passenger train, the same as if that train had been operated by per-

sons in the general employ of petitioner; that the fact of the collision between the two trains which were in legal effect being operated by petitioner upon its track was such as to bring into operation the doctrine of res ipsa loquitur, and make a prima facie case of negligence on the part of petitioner as the proximate cause of the collision; and that, such negligent collision having resulted in the death of respondent's intestate, who was an employee of petitioner and engaged in interstate commerce in the course and scope of his employment at the time, the petitioner is liable to respondent, under the Federal Employers' Liability Act, for damages for such death.

VI.

Petitioner also asserts that it is not liable for the acts of the servants and employees of the Receivers of the Mobile & Ohio Railroad Company in operating the Mobile & Ohio passenger train over petitioner's tracks, because, it asserts, it is a union station and terminal company organized under what are now Secs. 5251 and 5252, Revised Statutes of Missouri 1939, and, therefore, not subject to the rule creating liability upon a lessor or licensor railroad for the negligence of others who are using its road as its lessees or licensees. This matter was pleaded by defendant below as an affirmative defense (R. 5), but it constitutes no defense in this case for two reasons, viz.: (1) It is wholly without support in the evidence, for all of the evidence conclusively established that defendant is a railroad corporation rather than a union station company, and (2) in any event there is nothing in the law which relieves a terminal railroad company from the rule casting liability upon a railroad for negligence of its lessees or licensees operating trains over its road. Let us consider these reasons separately.

The evidence offered by the petitioner consisted, in part, of Defendant's Exhibit 3, which is the "Agreement of

Consolidation between the Union Railway & Transit Company of St. Louis and the Terminal Railroad of St. Louis, under the name of 'Terminal Railroad Association of St. Louis' " (R. 31). The first paragraph of this agreement specifically states that the Union Railway & Transit Company was "**a railroad company** duly created and organized under the laws of the State of Missouri" and that the Terminal Railroad of St. Louis was "**likewise a railroad company** duly created and organized under the laws of the State of Missouri." The agreement then went on to provide (R. 32):

> " '1. The said Union Railway and Transit Company of St. Louis and the said Terminal Railroad of St. Louis shall be, and the same are hereby wholly consolidated into **one railroad company of the State of Missouri.**
>
> " '2. **The name of said consolidated company shall be "Terminal Railroad Association of St. Louis."** ' " (Emphasis ours.)

Petitioner suggests in its brief here that this Court can and should take judicial notice that the opinion of the Supreme Court of Missouri in State ex inf. Attorney General v. Terminal R. Association of St. Louis, 182 Mo. 284, 81 S. W. 395, and the opinions of this Court in United States v. Terminal R. Association of St. Louis, 224 U. S. 383, 56 L. ed. 810, and in United States v. Terminal R. Association of St. Louis, 236 U. S. 194, 59 L. ed. 535, show the petitioner to be a union depot and terminal company. While we doubt the propriety of this Court taking judicial notice of the facts in those cases, should it do so, it will find that this petitioner was held in those cases to be **a railroad corporation** rather than a union depot company, for the Supreme Court of Missouri, at page 292 of 182 Mo., and at page 395 of 81 S. W., with reference to petitioner here, said:

> "That consolidated corporation was **organized under the general railroad law of this state.** It is the respondent in this suit." (Emphasis ours.)

and this Honorable Court, at pages 406-407 of 224 U. S., with reference to this petitioner, said:

> "* * * **the Terminal Company is a terminal company and something more.** It does not confine itself to supplying and operating mere facilities for the interchange of traffic between railroads and to assistance in the collecting and distributing of traffic for the carrier companies. **It, as well as several of the absorbed terminal companies, were organized under ordinary railroad charters.**" (Emphasis ours.)

The petitioner here was not only incorporated as a railroad company, rather than a mere union station company, but it was actually operating a railroad in interstate commerce at the time here involved. It was, concededly, operating in interstate commerce from Missouri to Illinois the very railroad freight train upon which the deceased was working when he was killed (R. 27), and it was concededly within the operation of the Federal Employers' Liability Act (R. 8) which is by its specific terms applicable only to common carriers by railroad.

In any event, if the petitioner were a company organized under and subject to Secs. 5251 and 5252, Revised Statutes of Missouri 1939, that would not relieve petitioner from the operation of the rule casting liability upon it for the negligence of its lessees or licensees operating trains upon its road. In Clark v. Atchison, T. & S. F. R. Co., 319 Mo. 865, 6 S. W. 2d 954, the same contentions as are made by petitioner here, upon the same line of reasoning, were made in an effort to avoid the effect of the Missouri statutes casting liability upon a lessor or licensor railroad for the acts of its lessees or licensees (Secs. 5162 and 5163, Revised Statutes of Missouri 1939), that the Missouri Supreme

Court rejected such contentions, saying, in part (6 S. W. 2d, l. c. 958-959):

> "**The reasoning, with due deference to learned counsel, seems superficial.** It conclusively appears from the record, including the petition for removal, that the Terminal Company was incorporated as a railroad company and not as a union depot company. * * * Now there is no special statute providing for the incorporation of terminal railroad companies, nor is there one investing them with powers, privileges, and immunities not conferred upon other railroad companies. Terminal companies, such as appellant, are created under the statute relating to railroad companies generally. Article 2, c. 90, R. S. 1919. That statute, including said sections 9879 and 9880 [now Sections 5162 and 5163, R. S. Mo. 1939], is the primary source of their corporate power, and the limitations upon that power which it prescribes are binding upon them, regardless of anything that may appear in their charters. * * *
>
> "But the Terminal Company is unquestionably 'a railroad company' or 'railway corporation,' within the purview of the statutory provisions just referred to. * * *
>
> "In view of the long-established policy of the state of not permitting railroad companies to avoid their charter duties and responsibilities by leasing their roads or permitting other companies to run trains over them, **a legislative intent to relieve to any extent terminal companies from such duties and responsibilities must be made clearly manifest before the courts will be warranted in giving the alleged intent effect.**" (Bracketed portion and emphasis supplied.)

Petitioner here, in contending that the reason for the rule casting liability upon an owner railroad for the negligence of his lessees or licensees fails when the owner railroad is a terminal company, seeks to limit unduly the basis for the rule, and asserts that its sole basis lies in the fact

that a railroad cannot avoid its charter obligations to the public by leasing its properties to another. That, however, is only a part of the story, for, as was said in Chicago & G. T. R. Co. v. Hart, 209 Ill. 414, 417, 70 N. E. 654:

> "Statutory permission to lease its road does not relieve a railroad company from the obligation cast upon it by its charter unless such statute expressly exempts the lessor company therefrom. While the duty which rests upon the lessor companies to operate their roads is an obligation which they owe to the public, the permission given by the legislature, as the representative of the public, to perform that duty through lessees has no effect to absolve such companies from **the duty of seeing that the lessee company provides and maintains safe engines and cars, and that the employees of the lessee company to whom is entrusted the operation of their roads are competent and that they perform the duties devolving upon them with ordinary care and skill, for upon the character and condition of safety of such engines and cars and on the competency and care of such employees depend the lives and property of the general public. As a matter of public policy such lessor companies are to be charged with the duty of seeing that the operation of the road is committed to competent and careful hands**" (Emphasis ours),

and further (209 Ill., l. c. 421-422):

> "The public are interested in the safe and efficient transportation of passengers and property over the line of road the lessor herein was given power to construct and operate. Competent and careful servants, well constructed engines and cars, which are properly inspected and kept in good and safe condition of repair, are essential to the speedy and safe transportation of passengers and property. That such engines and cars to be used in the operation of the railroad shall be provided and kept in good repair is a chartered duty, compliance wherewith is of the greatest concern to the general public. **No more effective means of com-**

> **pelling the performance of that duty can well be conceived than to hold the lessor company responsible to all the world for the actionable negligence of the lessee company.** * * * The liability rests not only upon the ground the lessee company, in discharging the corporate powers and duties of the lessor company, is but the agent or servant as to all other than the lessor company, but also on the ground that sound public policy demands that all corporations which the State has created and given special privileges and powers **shall stand charged with the obligation and duty to see that such powers and privileges are properly exercised and discharged,** unless relieved by express authority of the law-making department of the State." (Emphasis ours.)

This Court, in North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591, recognized the full purport of what we have just above quoted from the Illinois Court's decision, when it said (232 U. S., l. c. 254):

> "Under the local law, as laid down in Logan v. Railroad, 116 Nor. Car. 940, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road; and **this upon the ground that a railroad corporation cannot evade its public duty and responsibility by leasing its road to another corporation,** in the absence of a statute expressly exempting it." (Emphasis ours.)

Manifestly, the fact that the petitioner in the case at bar is a terminal railroad company does not affect in the least its liability under the doctrine which we have heretofore dealt with in this brief.

VII.

Petitioner also contends that it is not subject to the rule making an owner railroad liable for the acts of its lessee or licensee in the operation of the road because, it asserts, the use of its tracks by the Mobile & Ohio was not volun-

tary on its part, but was forced upon it by certain decisions of this Honorable Court, hereinbefore mentioned (ante, p. 37), and that, under those decisions petitioner became the agent and servant of the Mobile & Ohio.

This purported defense, if it were any defense, would not be available to the petitioner here because it is, at best, an affirmative defense, by way of confession and avoidance, which was not pleaded nor proven by the petitioner. Such a defense confesses the use of petitioner's road by the Mobile & Ohio, which fact in itself casts liability upon the petitioner for the acts of the Mobile & Ohio in the latter's use of petitioner's road, and seeks to avoid the effect of that fact by showing such fact to have been brought about through compulsion rather than through voluntary conduct on petitioner's part—all of which obviously demonstrates that such a defense is an affirmative one. Certainly, no extended citation of authority is necessary to establish that where, as here, an affirmative defense is not pleaded in the trial court, it is not available in an appellate court (Cf. Merchants' Mutual Insurance Company v. Baring, 20 Wall. [87 U. S.] 159, 164-165, 22 L. ed. 250; Nulsen v. National Pigment & Chemical Co., 346 Mo. 1246, 145 S. W. 2d 410, 414).

Another reason why this purported defense is not available to the petitioner here lies in the fact that there was no evidence offered at the trial to support any such defense. The evidence in this record shows only that the Receiver for the Mobile & Ohio used defendant's tracks over a long period of time, under an arrangement whereby such Receiver paid petitioner compensation for such use, upon the same basis as compensation was paid petitioner by any other railroad for such use of such tracks (R. 11). There is nothing in the pleadings or the evidence that even faintly suggests that the relationship between petitioner and the Mobile & Ohio was involuntary on petitioner's part, and such purported defense is, obviously,

not now available to petitioner (Cf. Merchants' Mutual Insurance Company v. Baring, 20 Wall. [87 U. S.] 159, 164-165, 22 L. ed. 250; State ex rel. Rothrum v. Darby, 345 Mo. 1002, 137 S. W. 2d 532, 543).

Without any evidence in support of this imaginary defense ever having been presented, how can this Court determine that the petitioner was forced into an involuntary arrangement, the exact nature and character of which is no more than a detail in the petitioner's method of handling its business, whereby the Receivers of the Mobile & Ohio were authorized and permitted to use the petitioner's tracks? How, without there being any evidence offered on the matter either way, can it be said that the arrangement between the petitioner and the Mobile & Ohio was involuntary rather than voluntary? How, in the face of an established rule of law which, under such evidence as was adduced, makes the Mobile & Ohio Receivers and their servants and employees, the agents and servants of the petitioner, and in the absence of any evidence to the contrary, can this Court determine that that arrangement constituted the defendant an agent and servant of the Mobile & Ohio Receivers, as is contended by petitioner? Petitioner would have this Court assume facts favorable to it without there being any evidence one way or another as to the existence of such facts, merely from reading a decision or decisions of this Court which do no more than order and approve a reorganization of the contracts between the petitioner and its proprietary railroads, without this Court knowing anything about the details of the arrangement between petitioner and the Receivers of the Mobile & Ohio. This, we submit, cannot be done, for it would put the petitioner in the position of being able, upon appeal in any case, to then fix as voluntary or involuntary, as best suited petitioner in that particular instance and at that particular time, the status of its arrangement with any railroad for the use of its tracks.

There being no evidence in this case tending to support this purported defense now urged by petitioner, respondent is in no position to here undertake to discuss the merits of any such purported defense, and of a certainty this Court is likewise in no position to do so.

However, in this connection, let us point out that the lone case upon which petitioner relies for its assertion that it is relieved of liability under the rule making a lessor or licensor railroad liable for the acts of its lessees or licensees, because of the assertion that the use of petitioner's tracks by the Mobile & Ohio was "involuntary" on petitioner's part, viz., Smith v. Philadelphia, Baltimore & Washington R. Co., 46 App. (D. C.) 275, is not in point, and was determined upon an entirely different theory than is contended here by petitioner. In that case the defendant and the other railroad companies which owned the various terminal properties in Washington, D. C., and the various railroad companies which might desire to use those properties, by specific act of Congress (Act of February 28, 1903, 32 Stat. 909, 917, c. 856), were given

> "* * * **power to contract** with each other * * * in regard to the construction, maintenance, **use or operation** of any line or lines of railroad, terminals, terminal tracks, stations, or other works * * * **upon such terms as may be agreed upon between the parties to any such contract**" (emphasis supplied),

and the railroads owning the terminal properties, including defendant, did contract with the Southern Railway Company for its use of the terminal properties, and the contract specifically provided, *inter alia* (46 App. [D. C.], l. c. 283):

> "* * * that all losses and damages resulting from the fault or negligence of employees solely in the service of * * * either of the parties hereto * * * **shall be wholly borne by that party whose employees are**

> **at fault, or negligent, * * * and such party shall be wholly responsible and liable for the consequences thereof.**" (Emphasis supplied.)

The plaintiff there, whose intestate was an employee of the defendant, was killed by the negligent operation of an engine of the Southern Railway Company upon defendant's terminal tracks, and the plaintiff offered this contract in evidence as a part of her case. The Court, in holding the defendant not liable, in view of the act of Congress and the contract, said (46 App. [D. C.], l. c. 286):

> "**The question is not governed by those cases which have relation to leases by one railroad company to another for the operation of its tracks.** The contract in this case by which the Southern Railway Company was entitled to the use of the tracks of defendant * * * was entered into **by virtue of Congressional legislation** which * * * authorized the [companies] * * * to contract with each other * * * in regard to the construction, maintenance, **use, or operation** of any line or lines of railroad, terminals, terminal tracks, stations, or other work or properties * * * **upon such terms as may be agreed upon between the parties to any such contract**" (bracketed portion and emphasis supplied),

and, further (46 App. [D. C.], l. c. 288):

> "It is clear then that the plaintiff's intestate was an employee of defendant; that he was killed upon defendant's tracks by an engine operated by the Southern Railway Company **in accordance with the provisions of the Act of Congress and of the contract aforesaid.** The negligence was the negligence of the Southern Railway Company, and not of the defendant * * *." (Emphasis supplied.)

Manifestly, the decision in that case was founded solely and only upon the specific power, given to the particular de-

fendant by the act of Congress, to relieve itself by contract of the liability which the law otherwise would have cast upon it for the use of its tracks by its lessees and licensees, together with the contract which did so relieve the defendant of that liability. In other words, the defendant there had specific legislative authority to, and it in fact did, relieve itself by contract of liability for the acts of its lessees and licensees. No such power or authority was vested in the petitioner in the case at bar, and even if petitioner here had power to relieve itself by contract of liability under the general rule, there is no evidence that it did so. That a carrier cannot, without specific legislative authority, relieve itself by contract of the liability which a rule of local law passed upon it for the acts of its lessees and licensees, was fully recognized by this Court in North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591, when it said (232 U. S., l. c. 254):

> "Under the local law, as laid down in Logan v. Railroad, 116 Nor. Car. 940, the lessor is responsible for all acts of negligence of its lessees occurring in the conduct of business upon the lessor's road; and this upon the ground that a railroad corporation cannot evade its public duty and responsibility by leasing its road to another corporation, **in the absence of a statute expressly exempting it.**" (Emphasis ours.)

The local law in Illinois, which is identical with that in North Carolina, is expressed in Chicago & G. T. R. Co. v. Hart, 209 Illinois 414, 70 N. E. 654, where the Supreme Court of Illinois said (209 Ill., l. c. 422):

> "The liability [of a lessor or licensor railroad for the acts of its lessees or licensees] rests not only upon the ground the lessee company, in discharging the corporate powers and duties of the lessor company, is but the agent or servant as to all other than the lessor company, but also on the ground that sound public

policy demands that all corporations which the State has created and given special privileges and powers shall stand charged with the obligation and duty to see that such powers and privileges are properly exercised and discharged, **unless relieved by express authority of the law-making department of the State.**" (Bracketed portion and emphasis supplied.)

The case of Smith v. Philadelphia, Baltimore & Washington R. Co., supra, so strongly relied upon by petitioner, in fact emphasizes what we have previously said under point V to the effect that a dominant rule of local law must be considered, even though the case arises under the Federal Employers' Liability Act. In that case the contract between the carriers, which was authorized by the local law, was held to be binding in the determination of whether the lessor or licensor railroad was liable for the acts of its lessees or licensees, and, because the contract, which was authorized by the local law, did not hold the lessor or licensor railroad so liable, the lessor or licensor railroad's employee was denied a recovery. Had the railroads there contracted otherwise, they could have created a liability for the death which occurred there. In the case at bar the dominant rule of local law made the petitioner, Terminal Railroad Association of St. Louis, liable for the negligence of the agents and servants of its lessee or licensee, the Receivers of the Mobile & Ohio Railroad Company, as effectually as a written contract could have done so, and, therefore, liable to this respondent for the death of her decedent, an employee of petitioner, which resulted from the negligence of petitioner's said lessee or licensee.

CONCLUSION.

For the reasons, and upon the authorities, hereinbefore referred to, we most respectfully submit that the judgment below was for the right party; that there were no errors in

the judgment below materially affecting the substantial rights of the parties; that, accordingly, review of the opinion and decision of the Supreme Court of Missouri would serve no useful purpose; and that, in any event, petitioner has stated no proper ground for review of the opinion and decision of the Supreme Court of Missouri by writ of certiorari. Accordingly, respondent most respectfully submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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